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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-651

TEAMSTERS LOCAL UNION 657,
Petitioner

v.

JESSE RODRIGUEZ, ET AL.,
Respondents

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,
Petitioner

v.

JESSE RODRIGUEZ, ET AL.,
Respondents

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,
Petitioner

v.

JESSE RODRIGUEZ, ET AL.,
Respondents

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae* in Case No. 75-718. The EEAC supports the position of the Respondent East Texas Motor Freight System, Inc. ("ETMF") in urging the Court to reverse the decision of the Fifth Circuit Court of Appeals.[1] Written consent to filing this *amicus curiae* brief has been obtained from all parties and filed with the Court Clerk.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia. EEAC was founded to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the

[1] The EEAC has also filed a brief *amicus curiae* in the case of *T.I.M.E.-DC, Inc.* v. *United States*, No. 75-672, which also involves the proper role of statistics in a Title VII class action —the principal issue discussed herein. Accordingly, many of the points in this brief are the same as discussed in the brief in the *T.I.M.E.-DC* case. The parties in the *T.I.M.E.-DC* case have been served with copies of this brief.

Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

PRELIMINARY STATEMENT

Based solely on its finding of the absence of statistical parity for blacks and Mexican-Americans in the line driver's position, the Court of Appeals held that the defendants had discriminated against a class consisting of all Mexican-American and black city drivers employed by ETMF in the State of Texas. This class finding was in direct contravention of the parties' agreement at the commencement of trial that "the *only issue* presently before the Court pertaining to the company is whether the failure of the Defendant ETMF to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981." Accordingly, no evidence other than statistics was presented on the issue of whether the Company discriminated against any person other than the three named plaintiffs.

It is submitted that a statement by another panel of the Fifth Circuit Court of Appeals in *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir.

1974) accurately characterizes the Court of Appeals' treatment of the record in this case:

> "We recognize that statistics are a powerful tool in the hands of a Title VII plaintiff, but we are also aware that undue emphasis on their use may obscure rather than advance the judicial process." (footnote omitted)

In particular, the inherent deficiencies in the Court of Appeals' statistical parity approach to the class liability issue, and its undue reliance on statistics, yielded the following improper results:

1. Even though the plaintiffs' claims of individual discrimination were rejected by the district court, the defendants were deprived of the right to present evidence in defense of the charge that there were other alleged victims of discrimination.

2. The Court of Appeals' adherence to workforce statistics combined with its presumption that Title VII cases are "inherently class suits" caused it to make a class determination without a meaningful consideration of the factors required under Rule 23 of the Federal Rules of Civil Procedure.

3. The Court of Appeals invaded the province of the district court to consider all facts relevant to the determination of class certification and the issue of liability to the members of the purported class.

The issue of the proper role of statistics in a Title VII class action is now before this Court for the first

time. No issue is more crucial to rational and effective enforcement of the equal employment opportunity enactments. The standards which this Court adopts will not only affect the result in this case, but will have a far reaching effect in cases arising in different factual contexts.

When properly employed, statistics provide a relevant factor for determining whether discrimination has occurred. This Court has heretofore adhered to the principle that the objectives of Title VII are to determine (1) whether there are *identifiable* victims of discrimination entitled to relief and (2) if so, who are those victims and what remedy is appropriate to make them whole. *E.g.*, *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444 (1976).

These objectives can be achieved only if (1) statistics are assigned their proper role in the allocation of the burden of proof, (2) the prerequisites for Rule 23 class certification are properly applied, and (3) sufficient authority is left to the fact finder to make adjustments based upon the nature of the discrimination alleged, the victims identified, the remedies sought and the other facts surrounding the particular claim at issue. These guidelines were not followed in this case and, accordingly, it is to these issues that the following is directed.

ARGUMENT

I. The Court of Appeals' Failure to Recognize The Deficiencies and Dangers Inherent In Its Reliance Upon The Statistical Parity Theory Resulted In An Erroneous Conclusion of Liability In Favor of the Class.

A. *The Deficiencies and Dangers In Relying Solely Upon Workforce Statistics to Establish a* Prima Facie *Case.*

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), this Court held that the plaintiff must show the following to establish a *prima facie* case:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (footnote omitted)

Once such a *prima facie* case is established, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." The burden then shifts back to the plaintiff to show that the stated reason for the rejection is pretextual. (411 U.S. at 804).

Among the factors that may be relevant to show that the stated reason is pretextual is the petitioner's general policy with respect to minority employment. As to this factor, this Court stated that "statistics . . . may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." 411 U.S. at 805. But this

Court cautioned that general determinations based on the racial composition of the employer's workforce while helpful, "may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire." 411 U.S. at 805, n. 19.

As noted, pursuant to the stipulation of the parties, the *only* issue litigated at the trial in the case was whether the *three named plaintiffs* were discriminated against because their applications for line driver positions filed in 1971 were not considered by ETMF.[2] In effect, therefore, this case was tried as a *McDonnell Douglas* case.

Based primarily on the poor driving and safety records of plaintiffs as city drivers, the district court concluded that the plaintiffs failed to prove their claim of discrimination because they had not shown they were qualified for road driver positions. [Findings 20-23]. Thus, under the *McDonnell Douglas* standard there was a justifiable reason for refusing to hire and the workforce statistics were not controlling. It is submitted that the Court of Appeals had

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[2] The three plaintiffs also stipulated that when they were hired at ETMF's San Antonio terminal (in 1959, 1964 and 1965, respectively) they were employed "without regard to race, color, religion or national origin." It was also undisputed that the San Antonio terminal had never domiciled road drivers but was operated exclusively as a local, city-wide pick-up and delivery service. Further, as ETMF notes in its brief, the nearest company facility at which road drivers were employed was approximately 240 miles from San Antonio. Moreover, it was not contended that the "no transfer rule" was *per se* illegal (505 F.2d at 53).

no basis for concluding that this finding was clearly erroneous.

What is important to note as to the class issue, however, is that despite the stipulation limiting the issue at trial to the individual claims, the Court of Appeals held, *sua sponte*, that liability in favor of *all* minority city drivers had nonetheless been established.[3] This conclusion was based solely on the statistical underrepresentation of minorities in road driver positions. There was *no proof* that any other purported class member had ever applied for or was qualified (under whatever standard might be appropriate) for a road driver position. Thus, even though there was *no evidence* that any of the other city drivers could establish a *prima facie* case under the *McDonnell Douglas* standard, they were nonetheless found to have been victims of discrimination. The illogic of this reasoning is apparent: under the Court of Appeals' decision a person can gain a judgment of discrimination in his favor if he is a member of a class, even though he would not be entitled to such a judgment if he brought the action as an individual.

In effect, what the Court of Appeals did in this case was to make *two* conclusions based upon the workforce statistics. First, it found that workforce statistics alone were evidence of "past discrimination". Second, it then presumed, *without any further evidence*, that all members of the purported class suffered a legally cognizable injury which entitled

[3] And as noted below, pp. 20-21, the district court also ruled that "at no time" had the plaintiffs moved for a prompt determination of whether or not this was a class action, and "offered no credible proof on this issue." See *Rodriguez* v. *East Texas Motor Freight*, 6 FEP Cases 45, 49 (W.D. Tex. 1973).

them to relief. It is this jump to the second finding which is particularly contrary to the basic objective of fairly and accurately identifying the victims of discrimination and which is most likely to result in preferential remedial awards which may conflict with the objectives of the Act.

It is submitted that, in addition to statistics alone, there are several factors which must be considered when determining whether or not discrimination has occurred. Blanket acceptance of the Court of Appeals' approach often will bring about unsatisfactory results. For example, workforce percentages include all persons in the position at issue, regardless of when they were hired or promoted into the position. Often, it can be established that a significant percentage of the vacancies filled which are represented by the workforce percentages were filled prior to the effective date of Title VII. Similarly, a proper application of the appropriate statutes of limitation should restrict the courts to an examination of those acts of discrimination which have been timely raised. But many of the positions which make up workforce statistics may have been filled prior to the limitations cut-off date.[4] Thus, the workforce statistics are not

[4] The filing of a timely EEOC charge is a jurisdictional prerequisite to suit under Title VII. *E.g., Bowe* v. *Colgate Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969). Section 706(e) of Title VII provides that the charge must be filed within 180 days of the alleged violation (or 300 days in states with state laws prohibiting discrimination). 42 U.S.C. § 2000e-5(e). Thus, any Title VII claim accruing more than 180 days (or 300 days) prior to the date the EEOC charge is filed is barred. The most appropriate state statute of limitations is applicable to claims under 42 U.S.C. § 1981. *Johnson* v. *Railway Express, Inc.*, 421 U.S. 454 (1975).

always a reliable indicator of whether the members of the purported class have been legally recognizable victims of discrimination during the relevant period at issue.

One case which demonstrates the fallacy of relying on unevaluated statistics is *Watkins* v. *Steelworkers*, 516 F.2d 41 (5th Cir. 1975) decided by the Fifth Circuit subsequent to *Rodriguez*. There the district court found liability in favor of the entire class of black incumbent employees because the operation of a seniority system resulted in the employer's workforce being virtually all white. This, in turn, led to a remedial order requiring quotas to achieve statistical parity. The Court of Appeals rejected this result because, despite the absence of blacks in the workforce, there was no evidence that the class members "had suffered individual discrimination at the hands of the Company" (516 F.2d at 46). As the court stated further:

> "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. The facts reveal that none of plaintiffs sought employment with the Company before 1965, the effective date of Title VII. And additionally, the district court did not find that the Company has discriminated in hiring since 1965. The result which plaintiffs seek, therefore, is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j)."

In other words, the workforce statistics showing virtually no blacks were not determinative of liability

because the statistics resulted from acts occurring before the effective date of Title VII. This was not recognized, however, until the Court of Appeals, unlike here, focused upon whether there were identifiable victims of discrimination, rather than on the statistics alone.

Another problem with the presumption of discrimination based on workforce statistics is that the disparity may be the product of cultural and educational deprivation which, in some cases, may reduce the number of minority group members able to compete effectively for the specific positions at issue below the level indicated by unrefined population statistics. This cannot, *ipso facto*, be directly attributable to the particular employers being challenged. No one will question that employers and courts must assure that an employer's practices do not unjustifiably perpetuate these effects. It is unfair, however, automatically to presume discrimination on the part of the particular employer simply because of a statistical underrepresentation. Recognition of this unfairness is implicit in this Court's recent reevaluation of the disproportionate impact theory in *Washington* v. *Davis*, No. 74-1492, 12 FEP Cases 1415, 1421-22 1976). As this Court recognized, there are any number of enactments that may be more burdensome "to the poor and to the average black" (12 FEP Cases 1422). It is submitted that this results from the historical deprivation suffered by the poor and the black generally, not because of otherwise well intentioned, necessary and racially neutral statutes. Thus, in the employment context one may also question "how a [standard] establishing a racially neutral qualification for employment is nevertheless racially discriminatory . . . simply because a greater

proportion of Negroes fail to qualify than members of other racial or ethnic groups." (12 FEP Cases 1421).[5]

B. *The Proper Role of Statistics In Identifying Victims of Discrimination.*

Griggs v. *Duke Power Co.*, 401 U.S. 421 (1971), illustrates that workforce percentages are not necessarily determinative of the existence of illegal discrimination. There this Court held that when there was proof that blacks were eliminated at a *disproportionate rate* by the employer's tests and educational requirements, these requirements should be enjoined unless justified by business necessity. But there is no suggestion in *Griggs* that it can be presumed, as it was by the Court of Appeals in this case, that *every* black who the plaintiffs may contend is in the class was discriminated against by the employer simply because of a statistical underrepresentation in the workforce. On the contrary, because the Court centered on the rate of rejection for vacancies, it is implicit that the only ones who could properly be included in the *class of victims* are those who applied for the vacancies at issue and who were discriminatorily rejected by the educational, testing or other employment criteria.

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[5] Similarly, see *Coopersmith* v. *Roudebush*, 517 F.2d 818 (C.A.D.C. 1975) wherein the court sustained the employer's "recent legal experience" job requirement, despite the fact that it resulted in a substantially higher rejection rate for certain applicant groups. Cf., *Tyler* v. *Vickery*, 517 F.2d 1089 (1975), cert. denied, No. 75-1026, June 14, 1976 (Bar examination not discriminatory despite disproportionate impact on blacks).

Indeed, another panel of the Fifth Circuit in *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1379 n. 6 (5th Cir. 1974), severely questioned the type of statistics routinely employed in attempts to establish Title VII *prima facie* cases. Thus, even though the plaintiff there introduced Census and Standard Metropolitan Statistical Area (SMSA) data, the court concluded that "[m]eaningful comparison with the statistics for the general population was not possible on the record." (*Ibid.*). Further the court noted that comparison with general population data is of "questionable value" when considering positions for which the general population is not qualified. It also questioned whether statistics concerning the percentage of blacks in the area who were qualified for the specific job would be valid, as these figures still would not provide information on the "applicant pool and its racial composition." Thus, rather than merely accepting gross population statistics as evidencing discrimination, the *Hester* court evaluated whether the statistics presented were relevant to the particular job skill in question.

Thus, statistics on the rate of rejection may be relevant to the issue of whether a policy with a discriminatory impact should be prospectively enjoined. But when there is no general employment policy which is shown to be discriminatory, or when determining whether specific individuals actually are the victims of a discriminatory policy, it is the standard developed in *McDonnell Douglas* v. *Green* which should apply. That is, only those persons who can show that they applied or otherwise manifested their interest in vacancies during the relevant period and who were qualified should be presumed to be in the

class who can claim they were victims of a policy which is shown to be discriminatory.

An example of this type of approach is *Franks* v. *Bowman Transportation Co., supra*, 47 L. Ed.2d 444. There the discriminatory seniority system was enjoined prospectively, but the seniority relief was limited to a class of identifiable individual blacks who had applied for over the road positions and whose applications were put in evidence at trial. (47 L. Ed. at 457, 458 n. 10). The same approach was followed by the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 419 (6th Cir. 1974) where the Court enjoined the discriminatory practice for the benefit of blacks generally, but the class entitled to a full seniority carryover relief was properly limited to those city drivers who specifically requested a transfer or who filed a charge of discrimination with the EEOC.[6]

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[6] Similarly, in *ACHA* v. *Beame*, 531 F.2d 648 (2d Cir. 1976), the Second Circuit, to insure that the relief was limited to those "who had actually been discriminated against," set out the following test (531 F.2d at 656):

> "For guidance of the district court, we suggest that the burden of satisfying the court on this issue by a preponderance of the evidence should be on the individual plaintiffs. The female police officer might, for example, satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females."

C. *The Court's Misplaced Reliance on Statistics Resulted In An Erroneous Determination That All Members of the Purported Class Were Victims of Discrimination.*

In contrast to the careful manner in which other courts have sought to identify victims of discrimination, the Court of Appeals in this case made a quantum jump from the statistical presumption of "past discrimination" to the presumption that all members of the purported class were the victims of discrimination. Based on the record evidence, however, no one can say for sure whether anyone in the alleged class suffered as a result of the alleged discrimination. The effect on other city drivers of the no transfer policy, the seniority rules, and the qualifications for road driver simply were not issues which were adequately developed in the district court. There was no evidence as to the number of vacancies available, the desire of others to transfer, their qualifications relative to others seeking road driver jobs, or any other facts upon which a judgment that other city drivers may have been discriminatorily denied road driver vacancies could be based.

Indeed, there is evidence from which it can be assumed that many could not have been adversely affected by the challenged policies because many in the class would not assert that they had ever applied for or had any desire to be road drivers. Although perhaps the road driver position is the "prestige" position, it is a different job. As the Court of Appeals acknowledged, it requires longer hours and long periods away from home. Many of the city drivers are domiciled in cities where there are not terminals for ~~city~~ road drivers, so to transfer would require a reloca-

tion from their chosen place of residence.[7] When a transfer right was opened up to all city drivers, there were only a small number who ultimately transferred. Moreover, the record establishes that a majority of the Mexican-American and black city drivers who were members of defendant local union voted against a merger of the city driver and road driver seniority rosters, which suggests they had no desire to transfer.

The failure of the plaintiffs to present any evidence that any other city driver applied or was qualified for a road driver's position, plus the evidence suggesting that many of the city drivers had no desire to transfer, are simply irreconcilable with the Court of Appeals' conclusion that all minority city drivers were discriminated against. Again, there is *no evidence* that any of the class victims met the *McDonnell Douglas* v. *Green* standard, and substantial evidence that many of them could not.

The Court of Appeals reasoned that nothing in the *McDonnell Douglas* standard is inconsistent with the accepted practice of recognizing statistics as establishing a *prima facie* case in a class action.[8] While the statistics may be evidence of historical discrimination generally, it is totally inconsistent with *McDonnell Douglas* to suggest that it can be presumed from the statistics that every member of the class

[7] Only six of the 21 terminals in Texas domiciled road drivers.

[8] Although this Court in *McDonnell Douglas* was concerned with the burden of proof in an individual case, nothing in that opinion foreclosed a consideration of the applicability of the principles in that case to class actions.

was discriminated against when there was no evidence that *any* member satisfied the *McDonnell Douglas* standard.

The undue reliance on statistics instead of proof was further evidenced by the Court of Appeals' attempt to distinguish *McDonnell Douglas* on the grounds that *McDonnell Douglas* involved an applicant for employment, but in this case "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply." (505 F.2d at 55). The *only* evidence on the issue of whether or not city drivers were inhibited from applying is that the three named plaintiffs were *not* so inhibited. As to whether any other city driver was reluctant to apply, the Court of Appeals assumption is based only on conjecture.

Similarly, the Court rejects the significance of the vote by a majority of the blacks and Mexican-American employees in which a merger of the seniority rosters was rejected because, among other reasons, this does "not meet the question why those blacks and Mexican-Americans who have desired to transfer have not been permitted to do so. . . ." (505 F.2d at 57). Again, this is based on speculation, not proof. There was no evidence, other than that relating to the named plaintiffs, that any other city driver who desired to transfer was not permitted to do so.

In other contexts the courts have warned that "[it] is clear that Title VII actions cannot be successfully maintained on the basis of conjectural and speculative evidence." *Harper* v. *Trans World Airlines, Inc.*, 525 F.2d 409, 414 (8th Cir. 1975); *Robinson* v. *City*

of Dallas, 514 F.2d 1271, 1273 (5th Cir. 1975). See also, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975) where the Court affirmed dismissal of a class action when the named plaintiff was unable to establish a *prima facie* case under the *McDonnell Douglas* standard and because "he could only speculate that approximately 200 past and present employees" were also affected by the challenged practices.

It is the obligation of the district court to determine, based on the proof presented at trial, whether discrimination was established and, if so, against whom. In this case there was no evidence to justify a finding in favor of all other city drivers. For the Court of Appeals to find that each of the class members was a victim entitled to relief, without sufficient proof, constitutes undue usurpation of the district court's function without the benefit of an adequately developed record.

As this Court stated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971):

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Apparently, the Court of Appeals would leave the "winnowing" out of those not properly in the class to the remedy stage of the case. But this is incongruous. How can a finding of liability be entered in someone's favor, when implicit in this conclusion is

that when one centers on the remedy, that person may be shown not to have been injured? As this Court stated, the purpose of the remedy is "to make persons whole for *injuries suffered* on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422 (1975) (emphasis added). Other Courts have consistently held that proof of actual damages must be predicated on a showing that the class members were qualified for and denied particular vacancies. *Green* v. *Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1299 (8th Cir. 1975); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231-232 (4th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314-16 (6th Cir. 1975), pet. for cert. pending in Case No. 75-720; *Norman* v. *Missouri Pacific R.R. Co.*, 497 F.2d 594 (8th Cir. 1974). Indeed, as the Fifth Circuit stated in *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir. 1974):

> "[T]he initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown . . . to be possessed by the higher paid white employees and are job related."

In practical effect, deferring the issue of individual discrimination to the remedy stage results in no judicial economy; it merely postpones application of the *McDonnell Douglas* standard. If no identifiable victims can be demonstrated in this second proceeding, then it may often be the case that no unlawful discrimination has occurred, but rather that other, nondiscriminatory or time-barred factors were the source of the statistical imbalance. See *supra* pp. 6-12. See

e.g., *Washington* v. *Davis, supra.* Or, it may be established that the number of identifiable victims is substantially smaller than is presumed based upon the statistics. Then the failure to apply the *McDonnell Douglas* test in the liability stage may result in more expensive and protracted litigation. Because of the inevitable fallacies in the reliance upon unexamined statistics, until the focus is on who are the identifiable victims of acts of discrimination, the parties and the court are operating in a factual vacuum. Therefore, the earlier in the proceeding the *McDonnell Douglas* standard is applied, the sooner the ultimate issue of liability will be resolved, and the greater the possibility of settlement without trial.

In short, because the analysis in accordance with the *McDonnell Douglas* will ultimately be necessary, there is no valid reason for not applying it in the liability stage.

II. The Court of Appeals' Reversal of the Class Action Dismissal and Its *Sua Sponte* Certification of the Class Is Not Supported By the Record and Is Contrary to Rule 23 of the Federal Rules of Civil Procedure.

Pursuant to stipulation, *there was no evidence presented* of others in the purported class who had claims similar to that of the named plaintiffs. The district court concluded that because the plaintiffs had not moved for an order pursuant to Rule 23(c)(1) and had not presented any proof as to liability to the class, the class claim should be dismissed. On appeal, the plaintiffs conceded that the case had not been tried as a class action in the district court and their prayer was limited to a request that the case be "remanded to the district court for consideration of the

class action allegations" (Pltfs. Brf. to 5th Cir. at 48).

Notwithstanding this status of the record, the Court of Appeals on its own initiative certified a class of all Mexican-Americans and black city drivers included under the collective bargaining agreement covering the State of Texas.[9] This was based on the mystifying assumption by the Court of Appeals that "we have before us a record of the proceedings, completed as a class action . . ." 505 F.2d at 51. This cannot be squared with (1) the plaintiffs' failure to move for certification; (2) the stipulation that only the individuals' claims were at issue; (3) the express finding by the district judge who heard the evidence that "plaintiffs offered no proof of liability or damages as to any class" and that the post trial arguments were limited to the individual claims; and (4) the plaintiffs' admission on appeal that "the class action was never considered by the lower court" (Pltfs. Brf. p. 48).[10] There was simply no basis for

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[9] Interestingly, the Court of Appeals held that outside applicants should not be included in the class because "the plaintiffs never pursued the action on behalf of these individuals." As discussed in the text, this same conclusion should have also followed with respect to the issue of whether the class of city drivers should be certified.

[10] The only support cited by the Court of Appeals for its conclusion was a colloquy during trial in which the plaintiffs' attorney indicated that apparently they had second thoughts about the stipulation and they still *claimed* to represent a class. But what must, of course, be determinative is their failure to present any evidence on the class and their post-trial acknowledgement that the matter had not been tried as a class action.

the Court of Appeals conclusion that the district court's finding was clearly erroneous.

Even more irreconcilable with traditional standards of appellate review was the Court of Appeals' *sua sponte* certification of the class. Apparently, this was prompted by the Court of Appeals' presumption that Title VII suits are "inherently class suits." In many respects, this is closely related to the court's wholesale reliance upon the statistical presumption because the only apparent basis for the Court of Appeals' certification of the class was an instinctive feeling that other employees in the city drivers' classification must have been discriminated against because of the underrepresentation statistics. Because of the EEAC's concern that this presumption may be taken too literally, and in order to place the issue in perspective, it is necessary to note initially that the presumption is far from universally accepted. Numerous other courts have held that much closer attention must be given to the prerequisites for class action treatment expressed in Rule 23. Accordingly, various considerations which other courts have found applicable to Title VII class action claims which were not given due consideration by the Court of Appeals in this case are set out below.

It would seem axiomatic that the determination of whether the action shall be maintained as a class action should be made *before* a trial on the merits. Indeed, Rule 23(c)(1) specifically mandates such a determination "as soon as practicable after the commencement of the action." Due process requires that the parties know the full scope of the issues before evidence is presented. A principal objective of the 1966 revisions to Rule 23 was to insure against the

unfairness of allowing class members to decide whether they were in or out of the class following a judgment. Thus, the class should be identified before trial on the merits so it will be bound by all subsequent orders and judgments. *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 545-47 (1974).

Or, as then Judge Stevens stated in his dissent in *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194, 1207 (7th Cir. 1971):

> "At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or backpay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair."

In this case, the Court of Appeals has found liability in favor of a class, without even giving the defendants an opportunity to present evidence in opposition to the class claims. This is strikingly unfair.

In making the determination, the mere *claim* (without factual support) by the plaintiffs that they represent a class cannot be sufficient. The burden is on the plaintiff to establish facts sufficient to show that all of the prerequisites of Rule 23 have been met. *E.g.*, *Poindexter* v. *Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972). As stated, for example, in *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975):

> "If the mere assertion of widespread employment discrimination were sufficient to satisfy the typicality requirement, subsection (a)(3) would again be superfluous, since it would be unrealistic for a court to compare the claims and defenses of the plaintiff with the claims and defenses of a hypothetical class."

In this case, the plaintiffs did no more than *assert* a demand for class treatment. They did not even purport to present evidence in support of their allegations.

As with any allegation in the complaint, it is the district court's responsibility to determine whether the evidence presented by the plaintiffs supports the class action allegations. And, contrary to the Court of Appeals' presumption that Title VII cases are inherently class actions, it is not uncommon for plaintiffs to fail in this burden. For example, as found by the court in *Winfrey* v. *General Motors Corp.*, 11 FEP Cases 649, 650 (N.D. Ga. 1974):

> "As plaintiff's complaint merely repeated the wording of Rule 23(a) without any attempt to allege specific facts which would substantiate the allegations as to the propriety of class action treatment, we found the allegations insufficient for a Rule 23(c)(1) determination and required an affirmative showing as to the class allegations. Despite this requirement . . . plaintiff has not sought to make any showing that the alleged class exists, that there are questions of fact and law common to the class, that the claims of the plaintiff are typical of the alleged class, or that he is the proper representative of the alleged class. From plaintiff's total failure to comply . . . we must conclude that he is unable to, or

> does not care to, show the court that the action should be maintained as a class action."

See also, *Thompson* v. *Sun Oil Co.*, 523 F.2d 647, 649 (8th Cir. 1975); *Poindexter* v. *Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972); *Villarreal* v. *Braswell Motor Freight Lines*, 11 FEP Cases 831 (S.D. Tex. 1975); *Smith* v. *Liberty Mutual Ins. Co.*, 11 FEP Cases 734, 738 (N.D. Ga. 1974); *Kinsey* v. *Legg, Munson & Co., Inc.*, 60 F.R.D. 91, 100 (D.D.C. 1973).

Because, like any other allegation in the complaint, it is the plaintiffs obligation to come forward with the facts to support the class action allegations, there is no basis for putting the burden on the district judge to initiate the class determination. In an adversary system, the burden to make the motion should be on the one asserting the claim. It has never been the duty of a district judge to conduct the parties litigation for them. In this case, there was nothing inconsistent or unusual in the plaintiffs determining that they did not have sufficient facts to support a class action or that they could not adequately represent the class. When they failed to seek certification, and when, after a full trial there was no apparent change in their position, the district judge properly dismissed the class action. See *e.g.*, *Kaplan* v. *IATSE*, 7 F.E.P. Cases 895 (C.D. Cal. 1973).

Once facts are presented in support of a proper motion it is then the district court's responsibility to analyse those facts to determine whether the Rule 23 prerequisites have been met. In contrast to the Court of Appeals approach in this case, most courts have found that this requires much greater attention to the particular claims of the plaintiffs. For example, in *Smith* v. *Liberty Mutual Ins. Co.*, 11 FEP

Cases 734 (N.D. Ga. 1974) the court in rejecting the contention that every action based on race discrimination states a case for class action treatment, observed (11 FEP Cases at 739):

> "In terms of practicality there is no more difficult procedural problem than the one present. If one rejected applicant or one discharged employee or one unpromoted worker files a complaint, does that automatically subject an employer to account for thousands of jobs it may have and indeed, defend his whole employment practices over a period of years? Similarly, for the court, does such a naked complaint trigger an investigation which can proceed at great time and expense to unknown breadth and scope? Reason dictates that there be some preliminary showing that plaintiff's treatment was occasioned by a broad policy of discrimination and that the results were dictated by that policy and not by the specifics of his claim."

Here the trial turned on the particular facts relating to the named plaintiffs applications and individual qualifications for the job. Therefore, even if the plaintiffs had attempted to show others who were similarly situated, the specific facts surrounding their claims may have shown that their claims were so individualized that the requisite commonality and typicality could not be established. For example, it was held in *Patterson* v. *General Motors Corp.*, 10 FEP Cases 921 (N.D. Ill. 1974), as follows:

> "Moreover, even if the plaintiff were to specify grievances of other members of the purported class, the acts for which plaintiff complains are not susceptible to class treatment. For example, as noted, plaintiff claims that he was replaced by

> another employee, denied promotion, unjustifiably disciplined, compelled to return prematurely from leave, and prevented from holding a position in the union. But, the issue of whether a particular job assignment or a promotion denial was discriminatory would depend upon any number of factors peculiar to the individuals competing for the vacancy, including relative seniority, qualifications, availability for work and desire to perform the job. . . . In other words, the plaintiff's claims do not relate to general policies or practices which are allegedly discriminatory, but rather to individualized claims of discrimination which could not possibly present common questions of law or fact sufficient to justify class action treatment."

Numerous other courts have also held that plaintiffs claims were too individualized to meet the Rule 23 prerequisites. *E.g.*, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975) (plaintiff who was not qualified for maintenance promotion not an adequate class representative); *Thompson* v. *Sun Oil Co.*, 523 F.2d 647 (8th Cir. 1975) (plaintiff who was unable to identify class members who similarly applied and were rejected cannot represent a class); *Marshall* v. *Target Stores, Inc.*, 11 FEP Cases 775 (E.D. Mo. 1975) (plaintiff claimed denial of compensation commensurate with her duties; no showing other persons had same or similar grievance); *Peltier* v. *City of Fargo*, 10 FEP Cases 701 (D.N.D. 1975) (class denied because plaintiff's promotion claim not typical of any class claims involving different job classifications); *Donaldson* v. *Pillsbury Co.*, 11 FEP Cases 577 (D. Minn. 1975) (claim of plaintiff hired outside normal channels for special

work is unique and not typical of any class); *Rockett* v. *Lyman*, 12 FEP Cases 224 (D. Haw. 1974) (class denied because of no showing of class members who were denied employment on basis of religion or that any positions other than the one applied for by plaintiff were available); *O'Brien* v. *Shimp*, 356 F.Supp. 1259 (N.D. Ill. 1973) (class denied in hiring case where no concrete, definable class was established); *Kinsey* v. *Legg, Mason & Co., Inc.*, 60 F.R.D. 91 (D.D.C. 1973) (class denied for failure to meet typicality and numerosity rules where no proof other blacks applied for retail sales positions); *Blankenship* v. *Wometco Blue Circle, Inc.*, 59 F.R.D. 308 (E.D. Tenn. 1972) (Rule 23 requirements not met where plaintiff only alleges single discriminatory incident); *Gresham* v. *Ford Motor Co.*, 53 F.R.D. 105 (N.D. Ga. 1970) (class denied where plaintiff's claims only involve particular actions against one individual).

It is further submitted that the issue of whether the plaintiffs can adequately represent the class must be given much greater consideration than was afforded this prerequisite by the Court of Appeals.

As observed by Judge Godbold in a perceptive concurring opinion in *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122, 1126 (5th Cir. 1969) the presumption that broad class treatment is appropriate may be contrary to the interest of the class:

> "And, what may be most significant, an overbroad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process . . . One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an

> injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?"

It should be the duty of the district judge, and not the appellate court on review, to determine "as soon as is practicable" whether the particular named plaintiffs have proved they have the resources and ability to engage in the type of expensive and protracted litigation necessary to present fully the claim of each potential class member.

Moreover, the district judge must determine, based on a full factual record, whether there are conflicts among the potential class members that may preclude fair representation. Certainly, for example, there should have been much more factual development of the seeming inconsistency between the seniority relief requested by plaintiffs and the vote against a seniority merger by a majority of the minorities in one local union. (505 F.2d at 50). Indeed, the Court of Appeals concedes that it "cannot tell what assumptions were made implicit" and the extent that the vote represents "the actual preference of the class, therefore, is unclear". Clearly, this potential conflict should have been resolved based on a hearing in which the parties presented the full record. The Court of Appeals assumption that there was no conflict between the named plaintiffs and employees included within the class by plaintiffs can not be supported.

In addition to the foregoing there may be many other facts which would show either that the plaintiffs claims were too individualized or conflict with other members of the purported class. But, as the result of the *sua sponte* certification, the Court of Appeals foreclosed the parties from presenting all relevant facts.

Finally, the Court of Appeals foreclosed the possibility of determining whether a notice to the class prior to the finding of liability is appropriate. In *Air Line Stewards and Stewardesses Ass'n.* v. *American Airlines, Inc.*, 490 F.2d 636, 643 (7th Cir. 1973), the court held that, to the extent that the plaintiffs merely sought a declaration that the challenged policy is discriminatory and should be enjoined, the action should be treated as a Rule 23(b)(2) class action. To the extent the plaintiffs sought affirmative relief for individual class members in the form of reinstatement or back pay, however, the action would have to be maintained from the beginning as a Rule 23(b)(3) class action. In accordance with Rule 23(c)(2), this would require a notice to the class members advising them of their right to exclude themselves. Alternatively, Rule 23(d)(2) authorizes the district court to require a notice whenever necessary "for the protection of the class or otherwise for the fair conduct of the action."

As discussed in Section I herein, the principal error by the Court of Appeals was its assumption that all members of the alleged class were the victims of the alleged discrimination, even though there was no evidence to support the assumption, and affirmative evidence suggested that many in the class could not establish injury. It is submitted that the sensi-

ble and practical solution to this dilemma is to send a notice to the alleged class prior to certification describing the nature of the case and requesting each potential class member to state whether he claims that he was injured by the alleged practice and, if so, to state the facts in support of his claim. *See, Gerstle* v. *Continental Airlines, Inc.*, 406 F.2d 1374, 1376 (10th Cir. 1972). Such an approach was employed at the remedy stage in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 422-423 (6th Cir. 1974). It would seem even more logical to use such a notice prior to the class determination in a case such as this. This would allow the district judge to make the most meaningful and accurate determination as to whether the plaintiffs' claims are common to a numerous class of similarly situated claimants and whether the plaintiffs can adequately represent the class. The possibility of limiting the class or of creating subclasses could also be considered. Moreover, such a notice would present the unfair and incongruous holding in this case that all members in the class were victims of the discrimination, even though at the remedy stage (presumably after a notice is sent) they may not be able to show they were injured.

The district court's determination that the class action should be dismissed was not shown to be clearly erroneous. The Court of Appeals compounded its error by presuming that a class action was appropriate without an analysis of all relevant factors. As the foregoing authorities establish, the assumption that Title VII class actions are inherently class actions is too simplistic. Accordingly, at minimum, the Fifth Circuit should have vacated and remanded

the case to the district court for a determination pursuant to Rule 23(c)(1) of whether a class action is appropriate and, if so, who should be in the class. This should have been done in accordance with appropriate standards for affording the parties an opportunity to present a full factual record on this issue.

CONCLUSION

It is submitted that the guiding principle for Title VII was succinctly stated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), as follows:

> "Discriminatory preference for any group is precisely and only what Congress has proscribed."

It is the concern of the EEAC that an undue reliance upon statistical inferences of discrimination as evidenced by this case and others can undermine this basic objective. Statistics should be assigned no greater weight than is consistent with fairly and accurately identifying the victims of discrimination. The Court of Appeals' fallacious application of the statistical presumption in this case cannot be justified. Additionally, the court's class action determination undermined the purposes of Rule 23 FRCP, and undercut the district court's authority in this respect, without the benefit of a complete record having been established. Both actions of the Court of Appeals are inconsistent with the fundamental purposes of Title VII.

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